

July 18, 1991

MEMORANDUM

TO: The Honorable William W. Paty
Chairperson, Board of Land and Natural Resources

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: DLNR Investigation Report Concerning the Pacific Whale
Foundation

This is in reply to your memorandum dated May 8, 1991 requesting an advisory opinion concerning the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Department of Land and Natural Resources ("DLNR") must make available for public inspection and copying an investigation report compiled as part of a civil law enforcement investigation concerning the Pacific Whale Foundation ("PWF").

BRIEF ANSWER

Under the UIPA, agencies are not required to disclose "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. . 92F-13(3) (Supp. 1990). The legislative history of this UIPA exception to public access indicates that it applies to certain "[r]ecords or information compiled for law enforcement purposes." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

In determining whether the disclosure of records or

information compiled for law enforcement purposes would result in the "frustration of a legitimate government function" under section 92F-13(3), Hawaii Revised Statutes, we believe that Exemption 7 of the federal Freedom of Information Act, 5 U.S.C. . 552(b) (7) (Supp. 1990) ("FOIA"), provides useful guidance. Under Exemption 7(A) of FOIA, agencies are not required to disclose records or information compiled for law enforcement purposes, to the extent that disclosure "could reasonably be expected to interfere with enforcement proceedings."

Based upon our review of the DLNR investigation report, and federal court decisions applying FOIA's Exemption 7(A), we conclude that disclosure of the report could reasonably be expected to interfere with an enforcement proceeding against the PWF, which at this time is a concrete possibility. Therefore, we conclude that with the exception of a few enclosures to the investigation report described below, the DLNR is authorized to withhold public access to the report under section 92F-13(3), Hawaii Revised Statutes.

However, we express no opinion concerning whether the DLNR's investigation report is protected from disclosure under the UIPA when an enforcement proceeding against the PWF is no longer prospective or pending. When such proceedings are no longer a concrete possibility, or have concluded, the OIP will be in a position to provide additional guidance if so requested.

Lastly, although section 92F-19(a)(6), Hawaii Revised Statutes, permits an agency to disclose otherwise "confidential" government records "[t]o the legislature or any committee or subcommittee thereof," based upon case law construing a substantially similar provision of the Federal Privacy Act, 5 U.S.C. . 552a (Supp. 1990), this UIPA provision authorizes disclosures only to the Legislature or committees thereof, when acting as a whole, not to individual legislators. Accordingly, section 92F-19(a)(6), Hawaii Revised Statutes, would not, on these facts, authorize the DLNR's disclosure of the report to Senator Reed.

FACTS

Pursuant to the provisions of section 195D-4(e), Hawaii Revised Statutes, the Department of Land and Natural Resources ("DLNR") has issued a number of Scientific Collecting Permits to the Pacific Whale Foundation ("PWF") which authorizes it "to take by inadvertent harassment Humpback whales during the course of photographic studies of individual animals." Generally, section 195D-4(e), Hawaii Revised Statutes, prohibits the taking of any

endangered species of aquatic life, wildlife, or land plant without such a permit. The term "take" includes the harassment or pursuit of such endangered species. See Haw. Rev. Stat. . 195D-1 (1985).

Under the Scientific Collection Permits issued to the PWF, the PWF, among other things, is restricted from conducting aerial photography at altitudes lower than 500 feet in conducting photographic studies of Humpback Whales and is required "to keep disturbances to a minimum." Section 187-4, Hawaii Revised Statutes, provides that the DLNR may revoke any permit issued under chapter 195D, Hawaii Revised Statutes, "for any infraction of the terms and conditions of the permit." Additionally, section 195D-9, Hawaii Revised Statutes, establishes criminal penalties for a violation of any provision of chapter 195D, Hawaii Revised Statutes, or rules adopted thereunder.

In response to a complaint dated March 29, 1990 by Senator Rick Reed, the DLNR's Division of Conservation and Resources Enforcement conducted an investigation of allegations that the PWF had violated restrictions upon its Scientific Collection Permit issued by the DLNR under section 195D-4(e), Hawaii Revised Statutes. An investigator with the DLNR's Division of Conservation and Resources Enforcement compiled an 18-page investigation report (number OA-91-32) dated August 31, 1990. Attached to this report as "enclosures" are multiple pages of exhibits, witness statements, and other evidence and memoranda relied upon in the course of the investigation.

By letter dated April 29, 1991, to the DLNR, Senator Rick Reed requested a copy of the DLNR's investigation report concerning the PWF. In a memorandum dated May 8, 1991 to the OIP, you requested an advisory opinion concerning whether the DLNR's decision to deny Senator Reed access to the investigation report concerning the PWF is authorized by the UIPA.

By memorandum dated May 9, 1991, a copy of the investigation report concerning the PWF was forwarded to the Maui County Department of the Prosecuting Attorney for a possible criminal law enforcement action.

DISCUSSION

I. INTRODUCTION

The UIPA, the State's new open records law, generally provides that "[a]ll government records are open to inspection

and copying unless access is restricted or closed by law." Haw. Rev. Stat. . 92F-11(a) (Supp. 1990). In particular, section 92F-11(b), Hawaii Revised Statutes, states, "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours."

II. FRUSTRATION OF LEGITIMATE GOVERNMENT FUNCTION

Under section 92F-13, Hawaii Revised Statutes, agencies are not required by the UIPA to disclose "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. . 92F-13(3) (Supp. 1990). The legislative history of this UIPA exception reflects that, among other things, section 92F-13(3), Hawaii Revised Statutes, permits agencies to withhold access to "[r]ecords or information compiled for law enforcement purposes," but only if disclosure would frustrate a legitimate government function. See S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

Exemption 7 of the federal Freedom of Information Act, 5 U.S.C. . 552 (Supp. 1990) ("FOIA"), also permits federal agencies to withhold access to certain "records or information compiled for law enforcement purposes." As a result, in previous opinion letters, we have stated that FOIA's Exemption 7 provides useful guidance in applying the UIPA's exception for records or information compiled for law enforcement purposes, the disclosure of which would result in the frustration of a legitimate government function under section 92F-13(3), Hawaii Revised Statutes. See OIP Op. Ltr. Nos. 90-18 (May 18, 1990); 90-36 (Dec. 17, 1990); 91-6 (May 2, 1991).¹

¹Our reliance upon FOIA's Exemption 7 as an extrinsic aid in construing the UIPA's exception for law enforcement records is consistent with the decisions of courts in other states when construing open records law exceptions for law enforcement records. See e.g., Citizens for Better Care v. Department of Public Health, 215 N.W.2d 576 (1974); Lodge v. Knowlton, 391 A.2d 893 (N.H. 1978) (in absence of legislative standards, FOIA's Exemption 7 adopted for guidance); American Civil Liberties Union v. Deukmejian, 186 Cal. Rptr. 2d 235, 241 (Sup. 1982) ("we believe the two statutes should receive a parallel construction").

The Honorable William W. Paty
July 18, 1991
Page 5

Under Exemption 7 of FOIA, federal agencies are not required to disclose:

[R]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person to a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority . . . and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation . . . information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. . 552(b)(7) (Supp. 1990) (emphasis added).

As we have noted before, Exemption 7 applies to records or information compiled in connection with an agency's enforcement of both civil and criminal statutes, see OIP Op. Ltr. No. 89-17 at 5 (Dec. 27, 1989), as well as those statutes authorizing administrative (regulatory) proceedings. See e.g., Center for National Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370, 373 (D.C. Cir. 1974). However, if an agency lacks authority to pursue a particular law enforcement matter, Exemption 7 generally may not be invoked. See, e.g., Weissman v. CIA, 565 F.2d 692, 696 (D.C. Cir. 1977).

A determination of whether Exemption 7(A) permits agency withholding requires a two-step analysis focusing on: (1) whether a law enforcement proceeding is pending or prospective, and (2) whether release of information about it could reasonably be expected to cause some articulable harm. Exemption 7(A) was not intended to "endlessly protect material simply because [it]

is in an investigation file." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232 (1974). Rather, Exemption 7(A) is temporal and, as a general rule, may be invoked only as long as an enforcement proceeding is pending or prospective, although there are exceptions. See, e.g., Seegull Mfg. Co. v. NLRB, 741 F.2d 882, 886-87 (6th Cir. 1984). Under this exemption, a law enforcement proceeding is "prospective" if such a proceeding is a concrete possibility, rather than a mere hypothetical one. See Badran v. Department of Justice, 652 F. Supp. 1437, 1440 (D.C.N.D. Ill. 1987). It may also be invoked where an investigation, though in a dormant stage, "is nonetheless an 'active' one which will hopefully lead to a 'prospective law enforcement proceeding.'" National Public Radio v. Bell, 412 F. Supp. 509, 514 (D.D.C. 1977).

With respect to the showing of harm to law enforcement proceedings required to invoke Exemption 7(A), the U.S. Supreme Court has rejected the position that "interference" must always be established on a document-by-document basis, and it has held that a determination of the exemption's applicability may be made "generically" based on the categorical types of records involved. NLRB v. Robbins Tire & Rubber Co., 437 U.S. at 236.

As stated by the court in Curran v. Department of Justice, 813 F.2d 473, 475 (1st Cir. 1987), "a tightrope must be walked: categories must be distinct enough to allow meaningful judicial review, yet not so distinct as prematurely to let the cat out of the investigative bag."

Under Exemption 7(A), courts have sustained an agency's withholding of such information as details regarding initial allegations giving rise to an investigation; interviews with witnesses and subjects; an investigator's summary of findings; investigative reports furnished to the prosecuting attorneys; contacts with prosecuting attorneys regarding allegations; prosecutive opinions; and other materials that would permit a target of an investigation to discern the investigation's scope, direction, limits, and sources of information relied upon. See Spannus v. U.S. Department of Justice, 813 F. 2d 1285, 1287 (4th Cir. 1987); Curran v. U.S. Department of Justice, 813 F.2d 473 (1st Cir. 1987); Doyle v. Behan, 670 F.2d 535 (5th Cir. 1982); Wright v. Occupational Safety and Health Admin., 822 F.2d 642 (7th Cir. 1987). Courts have also sustained the withholding of such information as "identities of possible witnesses and informants, reports on the location and viability of potential evidence, and polygraph reports" under Exemption 7(A). See Bevis v. Department of State, 801 F.2d 1386, 1390 (D.C. Cir. 1986).

On the contrary, however, federal courts have held that Exemption 7(A) will generally not afford protection where the target of the investigation has possession of or submitted the information in question. See, e.g., Wright v. OSHA, 822 F.2d at 646; Grasso v. IRS, 785 F.2d 70, 77 (3d Cir. 1986); Campbell v. HHS, 682 F.2d 256, 262 (D.C. Cir. 1982). This is the case, because the courts have consistently stated that Congress intended Exemption 7(A) to apply "whenever the government's case in court would be harmed by the premature release of information," Robbins, 437 U.S. at 232, or where disclosure would impede any necessary investigation before the enforcement proceeding. See National Pub. Radio v. Bell, 431 F. Supp. at 514-515.

In applying the above principles to the pertinent DLNR investigation report, we conclude that it contains "information compiled for law enforcement purposes" within the meaning of section 92F-13(3), Hawaii Revised Statutes. We also conclude, based upon the current status of the investigation, that a civil or criminal law enforcement proceeding against the PWF is a concrete possibility, not merely a hypothetical one.

Moreover, based upon our examination of the DLNR investigation report and the authorities set forth above, we conclude that except as noted below, its disclosure "could reasonably be expected to interfere with enforcement proceedings" and, therefore, for the present, the DLNR may properly deny access to the report under section 92F-13(3), Hawaii Revised Statutes. Because the report contains such information as witness statements, investigator findings and recommendations, and an analysis of documentary and physical evidence, its disclosure at this time could reasonably be expected to interfere with a prospective criminal or civil law enforcement proceeding.

However, we also find that a few enclosures or attachments to the report are not protected from disclosure. Specifically, we find that the disclosure of enclosures 18 and 21 to the report, which are correspondence from the PWF, could not reasonably be expected to interfere with an enforcement proceeding, because they were supplied by the PWF, the target of the DLNR's investigation. We also conclude that the disclosure of copies of the PWF's Scientific Collecting Permits, also attached to the report, could not reasonably interfere with a prospective law enforcement proceeding, as the PWF is well aware of their contents.

We express no opinion concerning the public's right to inspect and copy the DLNR's investigation report regarding the PWF when the DLNR's investigation is closed, or when enforcement proceedings are neither pending or prospective.² When an enforcement proceeding against the PWF is neither prospective or pending, the OIP will be in a better position to determine the extent to which the report must be made available for public inspection and copying under the UIPA.

We now turn to an examination of whether, as a legislator, Senator Reed's access rights to the DLNR investigation report are greater than those of the public under part II of the UIPA.

III. LEGISLATIVE ACCESS TO GOVERNMENT RECORDS

Section 92F-19(a), Hawaii Revised Statutes, permits the inter-agency disclosure of government records which are otherwise "confidential" under the UIPA's personal privacy and frustration of legitimate government function exceptions, section 92F-13(1) and (3), Hawaii Revised Statutes. Section 92F-19(a)(6), Hawaii Revised Statutes, permits an agency to disclose such records "[t]o the legislature or any committee or subcommittee thereof."

In OIP Opinion Letter No. 90-24 (July 9, 1990) we stated that the inter-agency disclosure provisions of section 92F-19, Hawaii Revised Statutes, are discretionary. That is, agencies may, but are not required, to disclose otherwise confidential government records to other agencies as authorized by section 92F-19, Hawaii Revised Statutes.

Even assuming, however, that section 92F-19, Hawaii Revised Statutes, is mandatory, in OIP Opinion Letter Nos. 90-10 (Feb. 26, 1990) and 91-7 (May 9, 1991), based upon a decision of the Ninth Circuit Court of Appeals interpreting a substantially identical provision of the Federal Privacy Act of 1974, 5 U.S.C. . 552a, we concluded that section 92F-19(a)(6),

²Because it is possible that the investigation report may be made part of the record of a civil or criminal law enforcement proceeding and, thereby be publicly accessible, it would be premature for the OIP to express an opinion on a set of facts which at this point are speculative at best.

Hawaii Revised Statutes, only authorizes disclosure of "confidential" government records to the Legislature or committees thereof, when acting as a whole, not to individual legislators. See OIP Op. Ltr. No. 90-10 at 7-8.

Lastly, we note that under section 92F-12(b)(5), Hawaii Revised Statutes, agencies must disclose "[g]overnment records pursuant to a subpoena from either house of the state legislature." However, because access to the DLNR's investigation report concerning the PWF is not sought pursuant to a legislative subpoena, this UIPA provision is inapplicable to the facts presented.

CONCLUSION

Under part II of the UIPA, agencies are not required to disclose "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. . 92F-13(3) (Supp. 1990). The legislative history of this exception to public access indicates that it applies to certain "[r]ecords or information compiled for law enforcement purposes."

Using Exemption 7 of the FOIA for guidance, we conclude that except as noted above, the DLNR is authorized to withhold public access to its investigation report concerning the PWF under section 92F-13(3), Hawaii Revised Statutes. Under Exemption 7(A) of the FOIA, agencies are not required to disclose records or information compiled for law enforcement purposes to the extent that disclosure could reasonably be expected to interfere with enforcement proceedings. Because a civil or criminal law enforcement proceeding against the PWF is a concrete possibility, based upon our examination of the contents of the report, it is our opinion that the public disclosure of the same at this time could reasonably be expected to interfere with a potential law enforcement proceeding.

We express no opinion at this time concerning whether the investigation report must be publicly accessible when an enforcement proceeding against the PWF is no longer prospective or where such proceedings, if any, have concluded. The OIP shall, upon request, address this question, at a later date.

The Honorable William W. Paty
July 18, 1991
Page 10

Lastly, for the reasons mentioned above, the provisions of section 92F-19(a)(6), Hawaii Revised Statutes, would not authorize the disclosure of the investigation report to Senator Reed under the facts presented.

Hugh R. Jones
Staff Attorney

HRJ:sc
c: The Honorable Rick Reed

APPROVED:

Kathleen A. Callaghan
Director